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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

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In re:	)	Case No. 12-12020 (MG)
	)	
RESIDENTIAL CAPITAL, LLC, <u>et al.</u> ,	)	Chapter 11
	)	
Debtors.	)	Jointly Administered
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**DEBTORS' OMNIBUS REPLY TO RESPONSES TO DEBTORS' MOTION FOR  
ORDER UNDER 11 U.S.C. §§ 105(a), 365(a) AND 554(a) AND FED. R. BANKR. P. 6006  
AND 9014, AND LOCAL BANKRUPTCY RULE 6006-1 APPROVING PROCEDURES  
REGARDING THE FUTURE REJECTION OF EXECUTORY CONTRACTS AND  
UNEXPIRED LEASES**

TO THE HONORABLE MARTIN GLENN  
UNITED STATES BANKRUPTCY JUDGE:

The debtors and debtors in possession in the above-captioned cases (collectively, the  
“Debtors”) submit this reply (the “Reply”) to the responses<sup>1</sup> to the *Debtors' Motion for Order*

<sup>1</sup> *The Objection of the RMBS Trustees to the Debtors' Motion for Order Under 11 U.S.C §§ 105(a), 365(a), and 554(a), Fed. R. Bankr. P. 6006 and 9014, and Local Bankruptcy Rule 6006-1 Approving Procedures Regarding the Future Rejection of Executory Contracts and Unexpired Leases* [Docket No. 2412] (the “RMBS Trustees' Objection”); the *Limited Joinder of Wells Fargo Bank, N.A., as Custodian for Residential Mortgage Backed Securities Trusts, to Objection of the RMBS Trustees to Debtors' Motion for Order Under 11 U.S.C § § 105(a), 365(a), and 554(a), Fed. R. Bankr. P. 6006 and 9014, and Local Bankruptcy Rule 6006-1 Approving Procedures Regarding the Future Rejection of Executory Contracts and Unexpired Leases* [Docket No. 2413] (the “Wells Fargo Joinder”); and the *Joinder of U.S. Bank National Association, the Bank of New York Mellon, the Bank of New York Mellon Trust Company, N.A. and Wells Fargo Bank, N.A. as Matter Services for Residential Mortgage Backed Securities Trusts to Objection of the RMBS Trustees to Debtors' Motion for Order Under 11 U.S.C §§ 105(a), 365(a), and 554, Fed. R. Bankr. P. 6006 and 9014, and Local Bankruptcy Rule 6006-1 Approving Procedures*

*Under 11 U.S.C. §§ 105(a), 365(a) and 554(a) and Fed. R. Bankr. P. 6006 and 9014, and Local Bankruptcy Rule 6006-1 Approving Procedures Regarding the Future Rejection of Executory Contracts and Unexpired Leases* [Docket No. 2326] (the “Motion”). In further support, the Debtors respectively allege as follows:

**REPLY**

1. The Debtors have agreed to consensually resolve most of the issues raised by the Respondents, as set forth in the revised proposed order (a copy of which is annexed hereto as Exhibit 1, the “Proposed Order”). Specifically, the issues that the Debtors believe have been resolved include the following:

- To the extent the Debtors seek to reject Servicing Agreements<sup>2</sup> relating to securitizations, the Debtors shall serve a Rejection Notice upon the current trustee and master servicer for the securitization;
- Any Servicing Agreements that the Debtors propose to reject shall not be included on Rejection Notices that contain other types of contracts and leases, but shall be set forth on separate Rejection Notices containing only Servicing Agreements (with no more than 100 Servicing Agreements contained on each such Rejection Notice);<sup>3</sup>
- If the Rejection Notice lists a Servicing Agreement, the Objection Notice Parties shall have 30 days to file with the Court and serve any objection; and

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*Regarding the Future Rejection of Executory Contracts and Unexpired Leases* [Docket No. 2414] (the “Master Servicers’ Joinder” and collectively with the RMBS Trustees’ Objection and the Wells Fargo Joinder, the “Responses.” Each of the respondents shall be referred to herein as the “Respondents”).

<sup>2</sup> Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Proposed Order.

<sup>3</sup> Substantially all of the Debtors’ Servicing Agreements are being assumed and assigned to Ocwen Loan Servicing, LLC, in connection with the sale of the Debtors’ mortgage loan origination and servicing platform. Accordingly, the Debtors anticipate that few, if any, Servicing Agreements will be rejected pursuant to the Rejection Procedures.

- Claims arising out of Rejected Contracts must be filed on or before the later of (i) the deadline for filing proofs of claim established by the Court in the Debtors' cases, or (ii) forty-five (45) days after the Rejection Date, or, (iii) if an objection to the Rejection Notice with respect to a Servicing Agreement is timely filed and received, forty-five (45) days after the withdrawal or resolution of the objection.

2. The Respondents also have raised a concern regarding the proposed Rejection Date of the Rejected Contracts with respect to Servicing Agreements. Specifically, the Respondents object to the Debtors' ability to reject Servicing Agreements as of the date of the Rejection Notice.

3. The Debtors submit that a Rejection Date that is effective as of the date the Debtors file and serve a Rejection Notice is permitted under the Bankruptcy Code and fair and reasonable under the circumstances. "[C]ourts considering the issue of whether a bankruptcy court is authorized to assign a retroactive rejection date under section 365(a) have held that it may do so 'when the principles of equity so dictate.'" BP Energy Co. v. Bethlehem Steel Corp., No. 02-CV-6419, 2002 U.S. Dist. LEXIS 22052, at \*10 (S.D.N.Y. Nov. 15, 2002) (citation omitted). Courts in this jurisdiction and others have authorized a rejection date as of the date of service of the rejection notice. See, e.g., Adelphia Bus. Solutions, Inc. v. Abnos, 482 F.3d 602, 607 (2d Cir. 2007) (assuming without deciding that the bankruptcy court had equitable authority to make its order retroactive); BP Energy Co. v. Bethlehem Steel Corp., 2002 U.S. Dist. LEXIS 22052, at \*14 (holding that "a bankruptcy court is not prohibited from assigning a pre-objection rejection date" and affirming the bankruptcy court's determination to assign a retroactive rejection date that preceded the counterparty's objection deadline); Constant Ltd. P'ship v.

Jamesway Corp. (In re Jamesway Corp.), 179 B.R. 33, 38 (S.D.N.Y. 1995) (authorizing the debtor to reject a lease retroactively where the landlord caused delay in the bankruptcy court's decision). See also Colony Beach & Tennis Club, Inc. v. Colony Beach & Tennis Club Assoc. (In re Colony Beach & Tennis Club Ass'n), No. 8:09-CV-535-T-33, 2010 U.S. Dist. LEXIS 18294, at \*13 (M.D. Fla. Mar. 2, 2010) (holding that "the bankruptcy court did not err in making the effective date of the rejection of the [lease] retroactive to the filing date of the Debtor's Motion to Reject."); In re Mid Region Petroleum, Inc., 111 B.R. 968, 970 (Bankr. N.D. Okla. 1990), aff'd, Gen. Am. Transp. Corp. v. Martin (In re Mid Region Petroleum, Inc.), 1 F.3d 1130 (10th Cir. 1993) (effective date of rejection of leases was the date the trustee gave notice to lessor of intent to reject); Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.), 103 B.R. 524, 535 (Bankr. D.N.J. 1988) (debtor may reject executory contract by clearly communicating intention to reject).

4. Indeed, this Court has recently authorized rejection procedures that allow for rejection to be retroactive to the date the rejection notice is served. See In re MF Global Holdings, Ltd., Case No. 11-15059 (MG) (Bankr. S.D.N.Y. Mar. 15, 2012) (Docket No. 566) ("the Rejection Notice shall set forth ... the proposed effective date for the rejection of each such Contract (which shall not be a date prior to the date of service of the Rejection Notice)"); In re Borders Group, Inc., Case No. 11-10614 (MG) (Bankr. S.D.N.Y. June 2, 2011) (Docket No. 964) (same).

5. In this case, in the event the Debtors determine to reject any Servicing Agreements, it is critical that the Debtors be permitted to reject the Servicing Agreements effective as of the date of service of the Rejection Notice. Specifically, for each day the Debtors remain obligated under the Servicing Agreements, it is possible that the Debtors could be

required to fund advances for taxes, insurance, principal, and interest on the mortgage loans related to those Servicing Agreements. The Debtors typically are reimbursed for these payments under the terms of the Servicing Agreements, but are concerned that their ability to actually collect advances could be challenged following the rejection of the Servicing Agreement.

6. In response to the Respondents' concern regarding the transition of the servicing obligations to a successor servicer, the Debtors have revised the Proposed Order to include a transition period whereby the Debtors shall continue to perform their servicing obligations. However, it would be overly burdensome for the Debtors to become obligated today to continue funding servicing advances of principal and interest—at a significant cost—upon rejection when there is no certainty that such payments will be reimbursed by the not-yet-identified successor servicer. Accordingly, the Debtors have modified the Proposed Order to make clear that even following the rejection of a Servicing Agreement, they will continue to meet their servicing obligations under the Servicing Agreements for a period of time without being obligated to make advances of principal and interest. Specifically, the Proposed Order has been modified to provide as follows:

(h) Notwithstanding anything to the contrary set forth in this paragraph 2, if the Rejection Notice lists a Servicing Agreement, any objection to the proposed rejection shall be filed with the Court and actually received by the Objection Notice Parties not later than 30 days after the Rejection Notice is filed. Notwithstanding the foregoing, and subject to the limitations noted below, the Debtors will continue to perform their respective obligations under each applicable Servicing Agreement identified in the Rejection Notice in accordance with the terms and

provisions thereof and shall cooperate with any successor servicer and the applicable trustee and master servicer in respect of the transition of such servicing until the earlier of (i) the date the Servicing Agreements are transitioned to a new servicer, and (ii) ninety (90) days after the date of the service of the Rejection Notice; *provided* that if an objection is filed to the rejection of the Servicing Agreement such ninety (90) day period shall be extended to the earlier of (i) sixty (60) days after the Court upholds the Debtors' determination to reject the Servicing Agreement, or (ii) the date that the Servicing Agreement is transitioned to a new servicer (either such period, the "Servicing Period"); *provided further, however*, that the Debtors shall continue to receive any applicable servicing fees during the Servicing Period, and *provided further*, that notwithstanding the Debtors' agreement to continue performing servicing obligations, nothing herein shall require the Debtors to make any advances of principal and interest under the Servicing Agreements during the Servicing Period, and any claims resulting from the Debtors' agreement to perform under the Servicing Agreements during the Servicing Period shall not be subject to administrative expense status as a result of this Order.

7. This language should satisfy the Respondents' concerns regarding the transition of rejected Servicing Agreements to a successor servicer, while also eliminating the risk to the Debtors of being forced to fund advances of principal and interest following the Rejection Date, which may not be reimbursed. Further, to the extent a counterparty to the Servicing Agreement

or the applicable successor servicer agrees in writing, on a case by case basis, to reimburse the Debtors for servicing advances made, the Debtors may agree to continue making such advances following the Rejection Date.

8. The Debtors submit that the Proposed Order is reasonable and represents a sound exercise of the Debtors' business judgment. See NLRB v. Bildisco & Bildisco, 465 U.S. 513, 521 (1984); In re Balco Equities Ltd., 323 B.R. 85, 98 (Bankr. S.D.N.Y. 2005).

### **CONCLUSION**

WHEREFORE, the Debtors respectfully request that the Court overrule the Responses and grant the relief requested in the Proposed Order, a copy of which is annexed hereto as Exhibit 1, and grant such other and further relief as is just and proper.

New York, New York  
Dated: December 18, 2012

/s/ Gary S. Lee  
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**EXHIBIT 1**